IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.A No.604 of 2003

Decided on : June 29, 2007

Daulat Ram ....Appellant.

VERSUS

State of Himachal Pradesh ....Respondent.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?

For the Appellant : M/s K.D. Sood, Anup Chitkara & Sanjeev Sood, Advocates.

For the Respondent : Mr. Som Dutt Vasudeva, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. This appeal is directed against the judgment of the trial Court whereby the appellant has been convicted of an offence under Section 18 of the Narcotic Drugs and Psychotropic Substances Act and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/-, in default of payment of fine to undergo rigorous imprisonment for a further period of five years.

3. Relevant facts may be noticed first. On 3rd January, 2003, around 11.50 a.m., SI Om Parkash (PW-12), in the company of some Police officials, including PW-1 HC Amar Nath and PW-11 HC Shyam Lal, was present at a place called Nagchala on National Highway No.21, in connection with routine checking of buses, when Bus No.PB-12C-9013, driven by PW-5 Balbir Singh, reached there. The bus was got stopped for

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Whether the reporters of the local papers may be allowed to see the Judgment?

checking of the passengers and their baggage. Appellant was found sitting on seat No.32. He had a bag in his lap. When the bag was unzipped by PW-12 SI Om Parkash, four packets containing dark colour stuff which smelt like opium were found. The appellant was made to alight from the bus. All the four packets were seized. Two samples, each weighing 25 grams, from each of the four packets were separated. One sample from each of the four packets was sent to the Chemical Examiner, who opined that the sample had contents of opium.

4. Even though the alleged offence involves quantity less than commercial quantity, the trial Court has sentenced the appellant to rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo rigorous imprisonment for a further period of four years.

5. Before looking into the submissions made by the learned counsel for the appellant, we may notice that the maximum punishment prescribed for an offence where the quantity of opium is less than the 'commercial quantity' but more than 'small quantity' is ten years imprisonment and fine of Rs.1,00,000/- and, therefore, in view of the provision of Section 65 of the Indian Penal Code, the imprisonment in default of payment of fine cannot be more than 2½ years, which is equivalent to1/4th of the maximum sentence prescribed for the offence.

6. Appellant has assailed the judgment of the trial Court mainly on two grounds. First submission made by the learned counsel for the appellant is that the stuff is not proved to be opium within the meaning of Section 2 Clause (xv) of the Narcotic Drugs and Psychotropic Substances Act. According to him, the report of the Chemical Examiner Ex. PR does not say that the stuff was coagulated juice of opium poppy or that it was a mixture of coagulated juice with some other material having morphine content of more than 0.2 per cent.

7. Opium has been defined, as follows vide Clause (xv) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985:

> "opium" means----
>
> (a) the coagulated juice of the opium poppy; and
>
> (b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy,
>
> but does not include any preparation containing not more than 0.2 per cent of morphine.

8. From a bare reading of the definition of opium, it is clear that "opium" means coagulated juice of opium poppy or any mixture with or without neutral material of the coagulated juice of opium poppy having more than 0.2 per cent of morphine.

9. In the present case, report of the Chemical Examiner Ex. PR says that the samples were tested for meconic acid and morphine. Report does not say that the stuff was coagulated juice of opium poppy or it was mixture of coagulated juice with or without any neutral material and the percentage of the morphine in the mixture was more than 0.2 per cent.

10. The Hon'ble Supreme Court in *Amarsingh Ramjibhai Barot versus State of Gujarat, 2005 Supreme Court Cases (Cri) 1704,* has held that where the report of the Forensic Science Laboratory does not say that the stuff was coagulated juice of the opium poppy or it was a mixture with or without any neutral material of coagulated juice of opium poppy but simply expresses the opinion that the stuff is opium, as defined in the Narcotic Drugs and Psychotropic Substances Act, such a report is not acceptable and not binding on the court. This implies that the report of the Scientific Expert has to specifically mention that either the stuff is coagulated juice of opium poppy or it is a mixture of such juice with some other material having morphine content in excess of 0.2 per cent.

11. In the case before us, as already noticed, the report does not say that the substance is coagulated juice or is a mixture of coagulated juice with some other material having morphine content more than 0.2 per cent. Therefore, the report is held to be unacceptable and not binding. Now, if the report is excluded, there remains no evidence in support of the prosecution allegation that the stuff recovered from the appellant is opium.

12. Next submission made on behalf of the appellant is that as a matter of fact the bag containing the alleged opium was found by the police people in the bus lying unclaimed and that when despite enquiries by the police people nobody claimed it, the police planted it upon the appellant, on suspicion. He says that this plea is made out even from the prosecution's own evidence. He has drawn our attention to the statement of PW-4 Dilbag Singh, the Conductor of the bus. In his cross-examination, the witness has very categorically stated that the Investigating Officer, after bringing down the appellant and the bag from the bus, made enquiries with other passengers traveling by the bus as to whom the bag belonged. Now, if the bag was found lying on the lap of the appellant in the bus, as testified by the Investigating Officer and two other Police officials, where was the need for making enquiries with other passengers about the ownership of the bag.

13. Learned Additional Advocate General submits that PW-4 Dilbag Singh is not a credible witness. The witness was produced by the prosecution itself. Now, if he has said something against the prosecution that by itself would not make him an incredible witness. In case the prosecution felt that he was not a credible witness or had stated something contrary to its version or had stated something which was not true, it should have cross-examined him and confronted him with his statement under Section 161 of the Code of Criminal Procedure, after obtaining leave of the Court. But it chose not to do so for the reasons best known to it.

14. In view of the above discussion, we have no manner of doubt that this is not a fit case for conviction. Hence, the appeal is accepted. Judgment of the trial Court, convicting and sentencing the appellant for offence under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, is set aside and the appellant is acquitted. He being in jail, serving out the sentence awarded by the trial Court, is ordered to be set at liberty forthwith, in case his detention is not required in any other case.

(Surjit Singh), J.

June 29, 2007(sd) **(Kuldip Singh), J**